SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ,

Petitioner,

vs.

UNITED STATES,

Respondent.

BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
Reports of the Opinions of the Courts Below	1
Jurisdiction of This Honorable Court	1
Statutes and Rules Involved	2
The Question Presented for Review	5
A Concise Statement of the Case	6
Summary of Argument	9
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

CASES:

Boruff v. *U.S.*, 310 Fed. (2d) 918 (C.A., 5th Cir., 1962) 11, 15

Calland v. *U.S.*, 323 Fed. (2d) 405 (C.A., 7th Cir., 1963) 15

Camp v. *U.S.*, 352 Fed. (2d) 800 (C.A., 5th Cir., 1965) 15

Coppedge v. *U.S.*, 369 U.S. 438, 8 L. Ed. (2d) 21, 82 S. Ct. 917 (1962) 11, 17

Desmond v. *U.S.*, 333 Fed. (2d) 378 (C.A., 1st Cir., 1964) 13, 14, 15

Dillane v. *U.S.*, 350 Fed. (2d) 732 (C.A., D.C. Cir., 1965) 13, 15

Dodd v. *U.S.*, 321 Fed. (2d) 240 (C.A., 9th Cir., 1963) 12, 14, 17, 18

Glouser v. *U.S.*, 296 Fed. (2d) 853 (C.A., 8th Cir., 1961) 13

Page

Hannigan v. *U.S.*, 341 Fed. (2d) 587 (C.A., 10th Cir., 1965) 13, 14, 15

Mitchell v. *U.S.*, 254 Fed. (2d) 954 (C.A., D.C. Cir., 1958) 13

Rodriquez v. *U.S.*, 387 Fed. (2d) 117 (C.A., 9th Cir., 1967) 1, 8

Sunal v. *Large*, 332 U.S. 174, 91 L. Ed. 1982, 67 S. Ct. 1588 (1947) 17

U.S. v. *Peabody*, 173 Fed. Supp. 413 (D.C., W.D. Wash., 1958) 13

U.S. v. *Smith*, 387 Fed. (2d) 268 (C.A., 6th Cir., 1967) 15

Williams v. *U.S.*, 402 Fed. (2d) 548 (C.A., 8th Cir., 1968) 15

CONSTITUTIONAL PROVISIONS:

Fourth Amendment—Constitution of the U.S. 7
Fifth Amendment—Constitution of the U.S. 7
Fourteenth Amendment—Constitution of the U.S. 7

STATUES CITED:

18 U.S. Code §3190 7
28 U.S. Code §2255 ..... 2, 5, 6, 7, 8, 9, 13, 14, 17, 18, 19
28 U.S. Code—Rules of Criminal Procedure—Rule 37(a) 3, 5, 7, 8, 10, 11

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Reports of the Opinions of the Courts Below

1. Unreported Memorandum and Order of the United States District Court for the Northern District of California, Northern Division (now the United States District Court for the Eastern District of California), dated June 27, 1966, in Civil No. 9670 (Appendix pp. 19-20).

2. *Per Curiam* Opinion of the United States Court of Appeals for the Ninth Circuit, dated December 5, 1967; reported in 387 Fed. (2d) 117 (C.A., 9th Cir., 1967) (Appendix pp. 21-22).

Jurisdiction of This Honorable Court

This matter comes before this Honorable Court on an Order granting a Writ of Certiorari dated November 18, 1968 (Appendix p. 24) to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming an

order of the U.S. District Court for the Eastern District of California made without hearing, denying the motion of Petitioner Rodriquez for relief pursuant to the provisions of 28 U.S.C. §2255.

Statutes and Rules Involved

1. 28 U.S.C. Section 2255:

"Section 2255. *Federal custody; remedies on motion attacking sentence.*

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial

or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

2. Rule 37—Rules of Criminal Procedure—Title 28 U.S.C.:

"Rule 37. *Taking Appeal; and Petition for Writ of Certiorari*

"(a) *Taking Appeal to a Court of Appeals.*

"(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken

by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, and place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when

authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

The Question Presented for Review

The motion of Petitioner Rodriquez for relief under Section 28 U.S.C. #2255 (Appendix pp. 12-18) alleged that at the time of the sentencing of Petitioner, oral notice of appeal was given; that he instructed his attorney to appeal; that his attorney agreed to do so; and that as a result of the fraud and deceit of his attorney, unknown to appellant until some time after the expiration of the ten (10) days for filing a notice of appeal provided by Rule 37-A of the Rules of Criminal Procedure, the attorney failed to file the required notice.

The motion for relief did not set forth "the nature of the error and prejudice which he proposes by appeal to correct" or "that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which he is entitled to a remedy under §2255" (Appendix p. 19).

The United States District Court for the Northern District of California, Northern Division, without a hearing, denied the motion for relief upon the ground that appellant in his motion failed to set forth the basis upon which an appeal would be prosecuted (Memorandum and Order June 27, 1966, Appendix pp. 19-20).

The Court of Appeals for the Ninth Circuit in accordance with its decisions previously rendered, affirmed the order of the District Court upon the ground that appellant had failed in his motion to set forth contentions showing merit in an appeal. This decision was in conflict with decisions

of the Courts of Appeal for the First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits.

The issue presented to this Court is whether or not upon the basis of an allegation that he was deprived of his right to appeal as a result of the fraud and deceit of his attorney, the Petitioner is entitled to and should be granted a hearing on his motion for relief under 28 U.S.C. #2255 without having set forth in his motion the grounds upon which he proposed to appeal if his right to appeal were restored.

A Concise Statement of the Case

The Petitioner was convicted by a jury on eleven counts of violations of the narcotics laws, and on June 20, 1963, was sentenced by the District Court for a period of 20 years on each count. A motion for a new trial was made by the Petitioner's retained counsel and denied. The Petitioner, who is of Mexican descent and whose knowledge of the English language was limited, stated that he requested the official court interpreter to advise the Court of his desire to appeal and also asked his counsel to tell the trial court that he wanted to appeal. He states that his counsel gave oral notice of appeal, and that the trial court told him that he would have to file a written notice. The Petitioner was then taken in custody by the marshal, being first placed in the county jail and then being transferred to the Federal prison at McNeill's Island, Washington. Petitioner states that before he was taken to the county jail his counsel advised both him and his wife that he would arrange for their appeals. The Petitioner neither saw nor heard from his counsel thereafter.

On August 7, 1963, Petitioner filed a written Notice of Appeal in the District Court in which he stated that he had theretofore given oral notice of appeal and that the document then filed was a formal notice of appeal. As points raised on appeal, the Petitioner referred to the Fourth, Fourteenth and Fifth Amendments, to Section 3109 of Title 18 of U.S.C.A. and stated that there was insufficient evidence at the trial to convict the defendants (Appendix pp. 2-3).

Without a hearing and on August 22, 1963, the District Judge filed a Memorandum and Order holding that Rule 37(a) of the Federal Rules of Criminal Procedure required that written notice of appeal be filed within ten days after the entry of judgment; that compliance with that requirement was jurisdictional; and denied leave to appeal *in forma pauperis* as futile (Appendix pp. 4-5).

On October 24, 1963, the Petitioner filed a motion in the Court of Appeals for leave to proceed *in forma pauperis* and requested the Court of Appeals to set aside the default and permit the Petitioner to perfect and present an appeal before that Court (Appendix pp. 5-10). Without a hearing the Court of Appeals on November 18, 1963 affirmed the District Judge and refused to treat the petition as an application for habeas corpus (Appendix p. 11).

On February 15, 1966, Petitioner filed a motion pursuant to Section 2255, Title 28 of the U.S. Code asking that judgment of conviction be set aside and that he be restored to the status of one on whom sentence had just been imposed and therefore had ten days in which to institute a direct appeal (Appendix pp. 12-18). Here the ground was that oral notice of appeal was given and that he was de-

frauded of his right to appeal by the failure of his counsel to file the necessary document. Again no hearing was held and on June 27, 1966, the District Judge denied the motion. In its "Memorandum and Order" the District Court referred to the Ninth Circuit cases holding that an applicant for relief under Section 2255 must "disclose the nature of the error and prejudice which he proposes by appeal to correct" (Appendix pp. 19-20).

On December 5, 1967, the Court of Appeals for the Ninth Circuit affirmed the District Court's Memorandum and Order in a *per curiam* decision (387 Fed. (2d) 117, Appendix pp. 21-22). The petition for a Writ of Certiorari to the Supreme Court of the United States followed on May 6, 1968.

It is clear that from the moment the Petitioner was removed from the Court House after being sentenced on June 20, 1963, he has been without the benefit of counsel. Petitioner believed that he was represented by counsel during the critical ten-day period in which a written notice of appeal should have been filed.

Even if retained counsel felt that his duty to the Petitioner terminated with the conclusion of the trial, there was a clear duty to file the notice of appeal as requested by his client, or at the very least to advise the Court and Clerk that he no longer represented the Petitioner, so that the Clerk could "prepare and file forthwith a notice of appeal on behalf of the defendant" as is provided in Rule 37(a)(2).

It is worthy of note that a written Notice of Appeal need contain no reference to the grounds for or basis of the appeal.

The Petition for Writ of Certiorari and the Memorandum for the United States in opposition to the granting of the Petition for a Writ of Certiorari both indicate a conflict in decisions between the Ninth Circuit and the different rule obtaining in the First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits. Basically the difference is that the Courts in the First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits hold that the defendant in a criminal case is entitled to a hearing in a Federal District Court upon his contention that his trial counsel failed to appeal from a judgment of conviction because of fraud or deceit without, as in the Ninth Circuit, also alleging valid grounds for or stating the basis of an appeal.

Summary of Argument

The rule in the Ninth Circuit is that a petitioner for relief under Section 2255 must first show the deprivation of a constitutional right and then, in addition, must show an error or prejudice which might have been corrected on appeal.

The Petitioner here claims that he was deprived of his right to appeal by reason of the fraud of his counsel. The courts of most circuits other than the Ninth have held that a petitioner making such a claim is entitled to a hearing, and that if his claim is supported at the hearing, his right of appeal must be restored.

We submit herein on behalf of Petitioner that the rule in those circuits is the proper and reasonable rule, and that the added requirement of the Ninth Circuit is wholly unreasonable and deprives the Petitioner of his constitutional rights.

Argument

The question at issue before this Honorable Court is a very narrow one. A prisoner of Mexican descent, whose knowledge of the English language necessitated the presence of an interpreter at his trial, was convicted and sentenced. He requested the interpreter to advise the Court and his counsel of his desire to appeal. The Petitioner was then removed to prison and never again saw nor heard from his trial counsel, who failed to file the written notice necessary under Rule 37(a)(2):

> "Petitioner, a Federal prisoner, failed to file a timely notice of appeal from his conviction although an oral notice of appeal was noted by his attorney at the time of his sentencing" (Decision of Court of Appeals, November 18, 1963, Appendix p. 11).
>
> "Oral notice of appeal was given at the time of sentencing, but Petitioner's trial counsel failed to file a written notice of appeal * * * " (Memorandum and Order of District Court dated June 27, 1966, Appendix p. 19).

The fact that an oral notice of appeal was given has been judicially determined. The record also makes it clear that the Petitioner believed that his counsel would file the necessary written notice.

When these facts are brought to the attention of the trial court, is not the Petitioner entitled to a hearing to determine whether the failure to file the written notice of appeal was the result of fraud of counsel or was the result of Petitioner's considered decision not to appeal?

Since *Coppedge* v. *United States*, 369 U.S. 438, 8 L. Ed. (2d) 21, 82 S. Ct. 917 (1962) an appeal in a criminal case has been a matter of right. If a court imposes sentence on a "defendant not represented by counsel, defendant shall be advised of his right to appeal and if he so requests, the Clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant" (Rule 37(a)(2)).

> "We think that the positive mandate contained in Rule 37(a)(2) that '[w]hen a court after trial imposes sentence upon a defendant not represented by counsel, the defendant *shall be advised of his right to appeal,*' coupled with Rule 44 of the Rules, '[i]f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him *at every stage of the proceeding* unless he elects to proceed without counsel or is able to obtain counsel,' compels the conclusion that Congress sought to protect against the very deprivation of a constitutional right that is threatened, whether through inadvertence, or lack of understanding of counsel of his full obligation under the appointment of the court."
>
> " • • • We think also that it is not an unwarranted construction of the language of Rule 37(a)(2) to construe the words 'defendant not represented by counsel' to mean a 'defendant not represented by counsel during the ten day period' after which his failure to file a notice of appeal would forever bar such right. • • • "
>
> *Boruff* v. *U.S.*, 310 Fed. (2d) 918, at 921 (C.A., 5th Cir., 1962).

The written notice of appeal need not state either grounds or the basis of the appeal. The filing of the written notice

of appeal is a simple ministerial act, performed by counsel if the defendant is represented, or by the Clerk if the defendant is without counsel. A notice of appeal merely preserves a right and of itself does nothing more. Its only purpose is to give the Clerk of the Court, the court reporter, and the prosecutor notice that the defendant desires a review of his trial. It starts the time running within which the appeal must be perfected by the preparation of the reporter's transcript, the filing of briefs and setting the case for argument. If a Petitioner can establish that he was deprived of his right to appeal by the failure of retained counsel to file a simple written notice with the Clerk when his client had requested him to do so, why should a Petitioner have to show more? Assuming that he proves that he was deprived of the right why should he not be placed in the position that he would have been in if his simple instructions had been carried out?

Such is the rule in other circuits. In the Ninth Circuit, however, the Court has held that in addition to showing that he has been defrauded of his right to appeal, the Petitioner must show "the loss of a basic right, constitutional or otherwise" or "the error and prejudice which he proposes by appeal to correct" (Memorandum and Order, Appendix p. 19).

In *Dodd* v. *U.S.*, 321 Fed. (2d) 240 (C.A., 9th Cir., 1963) the Court of Appeals for the Ninth Circuit stated:

> "There is logic to support a proposition that a failure of counsel to file notice of appeal will only justify relief under Section 2255, where there is also a showing of 'plain reversible error in the trial', Mitchell v. United States (supra), United States v. Peabody (supra) and Glouser v. United States (supra) (p. 245)."

Of the three cases cited in support, it is to be noted that *Mitchell* v. *U.S.*, 254 Fed. (2d) 954 (C.A., D.C. Cir., 1958) has been disapproved or overruled *sub silentio* in the District of Columbia Circuit by *Dillane* v. *U.S.*, 350 Fed. (2d) 732 (C.A., D.C. Cir., 1965); *U.S.* v. *Peabody*, 173 Fed. Supp. 413 (D.C., W.D. Wash., 1958) is a decision of a District Court within the Ninth Circuit; and in *Glouser* v. *U.S.*, 296 Fed. (2d) 853 (C.A., 8th Cir., 1961) the Court held that the record was clear that appellant did not expect or believe that his attorney would take an appeal.

In the Memorandum for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari, the Solicitor General stated at page 3 that while the Fifth, Seventh and District of Columbia Circuits support the rule that a failure of counsel to file a notice of appeal when requested to do so by his client is basis for relief under Section 2255 the better rule is that such a charge be accompanied by "some indication of the nature of the errors which allegedly occurred at trial". The Solicitor General cites *Desmond* v. *U.S.*, 333 Fed. (2d) 378 (C.A., 1st Cir., 1964) and *Hannigan* v. *U.S.*, 341 Fed. (2d) 587 (C.A., 10th Cir., 1965) as supporting the rule of the Ninth Circuit. An examination of these cases reveals an exactly contrary holding.

In *Desmond* v. *U.S.*, the Court of Appeals for the First Circuit held that the appellant "to obtain relief does not need to show 'plain reversible error in his trial' but that the shoe is on the other foot and that to defeat relief the Government must show that appellate relief would be futile" (p. 381).

In *Hannigan* v. *U.S.*, the Court of Appeals for the Tenth Circuit held (p. 588):

"At the time of imposition of sentence, the appellant was undoubtedly entitled to advice of counsel or the court concerning his unquestionable right to appeal. If counsel was discharged upon imposition of sentence without having advised his client of his right to appeal, and having protected him in the exercise of that right, it became the duty of the court under Rule 37(a)(2) to so advise the defendant and, if requested, cause the Clerk to 'prepare and file forthwith a notice of appeal on behalf of the defendant.'

"The time for filing an appeal under Section 37(a)(2) does not commence to run until the defendant has been advised of his right to appeal and the effective assistance of counsel has been afforded. See Boruff v. United States, 5 Cir., 310 F. 2d 918. Moreover, a convicted and confined person who has not been afforded the assistance of counsel concerning his right to appeal and the exercise thereof may collaterally attack his judgment of sentence under Rule 2255 for 'plain error' in the trial of the case. See Fennell v. United States (10 C.A.), 339 F. 2d 920."

How the Solicitor General could suggest that either *Desmond* or *Hannigan* were in accord with *Dodd's* "plain reversible error" requirement or the necessity for a disclosure of "the nature of the error and prejudice which he proposes by appeal to correct" demanded by the District Court and the Court of Appeals for the Ninth Circuit in the case at bar, is difficult to understand, though the Solicitor General only suggests that the two cases indicate that an application under Section 2255 should contain "some indication as to the nature of the errors which allegedly occurred at the trial".

The fact is that the Ninth Circuit stands alone. The First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits all agree that the right to appeal can only be lost as a result of the "considered choice" of the prisoner. Without multiplying authorities, we would cite the following:

First Circuit:

Desmond v. *U.S., supra.*

Fifth Circuit:

Boruff v. *U.S., supra;*
Camp v. *U.S.*, 352 Fed. (2d) 800 (C.A., 5th Cir., 1965).

Sixth Circuit:

U.S. v. *Smith*, 387 Fed. (2d) 268 (C.A., 6th Cir., 1967).

Seventh Circuit:

Calland v. *U.S.*, 323 Fed. (2d) 405 (C.A., 7th Cir., 1963).

Eighth Circuit:

Williams v. *U.S.*, 402 Fed. (2d) 548 (C.A., 8th Cir., 1968).

Tenth Circuit:

Hannigan v. *U.S., supra.*

District of Columbia Circuit:

Dillane v. *U.S., supra.*

The Solicitor General in the Memorandum of the United States in Opposition to the Granting of the Petition for Writ of Certiorari answered the Petitioner's claim that the rule in effect in the Ninth Circuit placed an impossible burden upon the Petitioner (Petition for Writ of Certiorari, p. 9) by stating that the requirement "would merely require a statement in layman's language, as to the nature of the errors at trial".

The Petitioner is of Mexican descent and his knowledge of the English language is limited. He was one of five defendants who were convicted after a trial lasting some five weeks and in which one person was found not guilty. Except for Petitioner's wife, the other defendants were each represented by separate counsel. How, without the assistance of counsel and without a reporter's transcript, a person such as the Petitioner could possibly prepare a statement as to the nature of the errors at the trial or show a plain reversible error at the trial is beyond comprehension. Certainly no layman with a limited knowledge of English could be expected to recognize and recall the errors of law affecting him as they occurred in an extended trial, particularly when other defendants represented by different lawyers were being tried at the same time.

The testimony necessary to establish why after giving oral notice of appeal, counsel failed to file the written notice of appeal should be simple to obtain. The testimony of the Petitioner and of his former lawyer would seem to be enough. Once it is established that the Petitioner did not intentionally relinquish his right of appeal the hearing should come to an end and the right of appeal should be restored.

The grounds for relief under Section 2255 are those which permit a collateral attack upon the sentence. Generally speaking a collateral attack must allege the loss or denial of a constitutional right. "Habeas Corpus will not be allowed to do service for an appeal." (*Sunal* v. *Large*, 332 U.S. 174, 91 L. Ed. 1982, 67 S. Ct. 1588 (1947).)

The right to appeal from a sentence following conviction of a crime is a matter of right. (*Coppedge* v. *U.S., supra.*) On appeal the appellant may assert any ground he believes will be effective. Most of the arguments on appeal do not approach the level of the denial of a constitutional right.

Therein lies the error of the rule of the Ninth Circuit for it conditions the exercise of the constitutional rights of a prisoner under Section 2255 by insisting that those rights may only be exercised if, in the opinion of the trial court, the prisoner also has valid grounds for a direct appeal. Perhaps the courts of the Ninth Circuit do not insist upon a finding of "a plain reversible error at the trial" (*Dodd* v. *U.S., supra,* at p. 245), but certainly these courts insist that a prisoner must show that he "suffered prejudice in not securing a review by appeal". (*Dodd* v. *U.S., supra,* at p. 246.)

It is a proper function of a trial court to find the facts in connection with a claim for relief under Section 2255 and to ascertain the basis for the claimed right to relief under that statute. It is not a proper function for a trial court to hold a hearing in an endeavor to discover whether the trial record contained a "plain reversible error" or whether a prisoner deprived of his right of appeal by fraud of counsel "suffered prejudice in not securing a review by appeal".

These are properly the functions of an appellate court aided by the transcript of the record at the trial, the briefs of counsel and oral argument.

The rule in the Ninth Circuit compels the trial court to sit in judgment on its own prior decision.

Does the extent of the hearing depend upon whether the trial court feels bound by the "logic" of the "plain reversible error" rule of *Dodd* or only by the necessity to find the "error and prejudice which he (the prisoner) proposes by appeal to correct" as stated by the District Judge? (Appendix p. 19.) What is meant by "judging the substantiality of Petitioner's claim"? (Appendix p. 19.)

It would seem that once the trial court departs from the constitutional issues presented by a Section 2255 petition and proceeds to questions relating to success or failure on appeal the court can only be safe if it conducts a full scale review of the entire record of the case.

Whatever the trial court decides is subject to appeal so anything less than a complete review of the whole case would only grant one more ground for reversal on appeal.

The trial court is asked, in effect, to pre-try the prisoner's appeal. The prisoner is given the right to have his appeal heard twice, once by the trial court and then by the Court of Appeals.

The procedure outlined in *Dodd* was designed to minimize successive applications under Section 2255. Many of the cases arose after the Petitioner had exercised his rights of appeal and post-conviction procedures either in state or Federal courts. The Petitioner here asks only one remedy —that he be restored to his constitutional right of appeal

taken from him by fraud of counsel. There is no need to apply rules designed to prevent successive applications for relief under Section 2255.

The Petitioner at Bar asks only that his right to appeal be restored. If he was defrauded of that right by an officer of the court he should have it restored. Whatever grounds the Petitioner may have for appealing his conviction and sentence should be set forth in his subsequent appeal before the Court of Appeals.

Conclusion

The case should be reversed and remanded to the District Court with instructions to appoint counsel for the Petitioner, advise the United States Attorney, and hold a hearing to ascertain if the failure to file the written notice of appeal was or was not the result of the considered choice of the Petitioner. If the Court finds that the Petitioner desired to appeal, then the sentence should be vacated and Petitioner should be re-sentenced, so that his right to appeal is restored.

Dated: San Francisco, California, January 23, 1969.

Respectfully submitted,

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On the Brief